

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Application of AT&T Inc. and
Deutsche Telekom AG

For Consent to Assign or Transfer
Control of Licenses and
Authorizations Held by T-Mobile USA, Inc.
and Its Subsidiaries

WT Docket No. 11-65

DA No. 11-799

REDACTED VERSION

**REPLY COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

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The Massachusetts Department of Telecommunications and Cable (MDTC)¹ respectfully submits these Reply Comments pursuant to the April 28, 2011 Public Notice by the Federal Communications Commission (FCC or Commission) establishing the pleading cycle for comments and petitions to deny the transfer of control of licenses and authorizations held by T-Mobile USA and subsidiaries to AT&T, Inc. (AT&T/T-Mobile merger).² In particular, the MDTC replies to and comments on the May 31, 2011 Petition to Deny by the State of New York Department of Public Service (NYDPS) regarding the need for the FCC to review closely the impacts on the level of competition as measured by market concentration that would result from the proposed AT&T/T-Mobile merger.³

¹ The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. G. L. c. 25C, § 1.

² *In the Matter of AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, DA 11-799, Public Notice Establishing Pleading Cycle (rel. Apr. 28, 2011) (Public Notice).

³ WT Docket No. 11-65, *Petition to Deny of the State of New York Department of Public Service*, filed May 31, 2011 (NYDPS Petition to Deny).

The MDTC supports the NYDPS's application of the Herfindahl-Hirschman Index (HHI) to the FCC's Numbering Resource Utilization/Forecast (NRUF) data to measure the concentration of mobile wireless service providers. The NYDPS staff applied the HHI screening tests to five Economic Areas in New York and determined that the New York City Area may have anticompetitive impacts resulting from the AT&T/T-Mobile merger.⁴ The MDTC conducted a similar analysis using Massachusetts-specific data and found HHI values for the Boston Metro and total Massachusetts areas which exceed the FCC's threshold triggers. AT&T acknowledged in its June 10, 2011 opposition filing that markets whose HHI values exceed the FCC's safe harbor screen should be subject to further review.⁵ Therefore, the Commission should acknowledge the merits of the NYDPS and MDTC HHI analyses and should subject the New York City Area, the Boston Metro and total Massachusetts Areas, and other similarly-impacted economic areas to additional case-by-case, competitive analysis. Furthermore, the Commission should allow additional comment on those analyses and impose merger conditions that will mitigate those impacts to Massachusetts consumers and competition.

I. Background on the AT&T/T-Mobile Merger Petition.

AT&T filed its merger application papers with the FCC on April 21, 2011, to acquire all of T-Mobile's assets for \$39 billion.⁶ AT&T is the wireline incumbent in 22 states and as of Q2 2009, AT&T nationally had 30% market share for retail mobile wireless subscribers, T-Mobile

⁴ NYDPS Petition to Deny, p. 9.

⁵ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply Comments (filed June 10, 2011), p. 101.

⁶ Acquisition of T-Mobile USA, Inc. by AT&T Inc., AT&T Description of Transaction, Public Interest Showing, and Related Demonstrations (redacted) filed with the FCC April 21, 2011 ("AT&T Public Interest Statement") at 9.

had 13%, Verizon had 33%, and Sprint Nextel had 18%.⁷ AT&T contends that the merger is in the public interest for the following reasons: 1) AT&T's existing network suffers from capacity constraints which will continue to get worse absent merger; 2) merger is the best alternative to solve spectrum and capacity constraints, which will benefit consumers; 3) merger will save costs and give ATT the ability to deploy LTE to more than 97% of Americans, thus stimulating jobs and economy; 4) merger will enhance public safety; 5) existing wireless market will remain competitive after the merger; and 6) merger will not harm competition.⁸ AT&T contends that it will save \$3 billion starting year three post-merger and has committed to increase capital expenditures by \$8 billion over the next seven years.⁹

Over 35,000 comments have been filed in this proceeding so far.¹⁰ Commenters who oppose the merger contended that the merger will create a duopoly in the wireless service field, or that the FCC should complete its review of wholesale competition policies before addressing the merger.¹¹ Some say that AT&T's backhaul and handset dominance, together with the removal of a facilities-based competitor, partner, and/or customer, will harm competition and

⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 , Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, FCC 10-81 ¶ 296 (rel. May 20, 2010) (*Fourteenth Report*), Table 3 ("Mobile Wireless Subscribers: Selected Facilities-Based Service Providers"), p. 31.

⁸ AT&T Public Interest Statement at 1-14.

⁹ *Id.* at 1, 9.

¹⁰ TR Daily, June 1, 2011 ("By this afternoon, more than 35,000 filings had been submitted in the proceeding electronically, although most of those were brief comments. Excluding brief comments, nearly 1,300 filings had been submitted.").

¹¹ Clearwire Corporation Comment, p. 3; COMPTTEL Petition to Deny, p. 29; DISH Network Petition to Deny, p. 2; Earthlink Petition to Deny, p. 9; Granite Telecommunications Comment, pp. 4-5; Leap Wireless and Cricket Communications Petition to Deny, p. 8; MetroPCS Communications and NTELOS Petition to Deny, p. 62; New Media Rights, Utility Consumers' Action Network and Privacy Rights Clearinghouse (NMR, UCAN and PRC) Petition to Deny, pp. 2, 23; New Jersey Division of Rate Counsel Petition to Deny, p. 29; Sprint Nextel Petition to Deny, p. 4.

consumers.¹² Other commenters contend that the low-price plans currently offered by T-Mobile to consumers may not be continued post-merger.¹³ Still other commenters contend that data roaming agreements, special access agreements, and agreements on sharing spectrum or acquiring spectrum will be harder to negotiate with AT&T due to lack of competitive pressure.¹⁴ Some commenters contend that the merger, if approved, should be subject to conditions which address spectrum shortages and divestiture, handset availability, equivalent services and price plans, special access, and/or roaming obligations agreements.¹⁵

The Commission, in reviewing the AT&T/T-Mobile merger application, must determine whether the proposed transfer of control of Commission licenses will further the public interest, convenience and necessity.¹⁶ The Commission has held that, "the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest."¹⁷ The FCC analyzes merger applications several ways, one of which is by identifying post-transaction market concentration levels. In its Fourteenth Report on the U.S. wireless market, the FCC used the Herfindahl-Hirschman Index (HHI) to measure market concentration

¹² Clearwire Corporation Comment, p. 2, 3; COMPTTEL petition to Deny, p. 15, 21; Cox Communications Comment, pp. 3, 7, 9; Earthlink Petition to Deny, p. 2; Fibertech Networks Comment, p. 2; Leap Wireless and Cricket Communications Petition to Deny, p. 24; New Jersey Division of Rate Counsel Petition to Deny, p. 48; Sprint Nextel Petition to Deny, p. 39.

¹³ NMR, UCAN and PRC Petition to Deny, p. 14; Sprint Nextel Petition to Deny, p. 28.

¹⁴ Cox Communications Comment, p. 7; DISH Network Petition to Deny, p. 7; Fibertech Networks Comment, p. 2; Leap Wireless and Cricket Communications Petition to Deny, p. 24; MetroPCS Communications and NTELOS Petition to Deny, p. 33; New Jersey Division of Rate Counsel Petition to Deny, p. 41; Sprint Nextel Petition to Deny, p. 55.

¹⁵ Cox Communications Comments, pp. 12-13; Fibertech Networks Comment, p. 29; Granite Telecommunications Comment, pp. 7-10; MetroPCS Communications and NTELOS Petition to Deny, pp. 34, 67-74.

¹⁶ *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, ¶ 16 (rel. Nov. 17, 2005).

¹⁷ *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, 25 FCC Rcd 5972, FCC 10-87, ¶ 9 (rel. May 21, 2010).

“because it is the most widely-accepted measure of concentration in competition analysis.”¹⁸

The Commission found that the population-weighted national average of HHI values was 2848 at the end of 2008, an increase of 174 points over 2007.¹⁹ Identifying changes in the level of market concentration are important because, as the FCC notes, “market concentration affects the likelihood that a single provider unilaterally, or a group of providers through coordinated action, could successfully exercise market power that results in price increases.”²⁰ The HHI measure is also used by the U.S. Department of Justice and the Federal Trade Commission in evaluating horizontal mergers.²¹

II. The NYDPS Found Potential Anticompetitive Impacts Using HHI.

The NYDPS filed a Petition to Deny the AT&T/T-Mobile merger on May 31, 2011, based on data analysis of five New York Economic Areas.²² This analysis showed that the merger will create a substantial impact in the short term for New York City, as measured by the Herfindahl-Hirschman Index (HHI) using proprietary NRUF data for December 2010.²³ The U.S. Department of Justice, in analyzing mergers, has acknowledged that the HHI is a

¹⁸ Fourteenth Report, ¶¶ 48, 52. The FCC provides an example of the mathematical calculation of the HHI: “For example, if four carriers are identified as participants in the relevant markets and each carrier accounts for 25 percent of total sales, the value of HHI would be 2500 [(25)² x 4].” *Id.*

¹⁹ *Id.* at ¶ 51.

²⁰ *Id.*

²¹ *U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines* (issued Aug. 19, 2010), available at: <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#5c>. These guidelines state, in section 5.3, that “market concentration is often one useful indicator of likely competitive effects of a merger” and using the HHI analysis, concludes that markets with HHI values above 2500 are “highly concentrated markets.” *Id.* These guidelines also assert that mergers which create an increase in HHI values of more than 200 points “will be presumed to be likely to enhance market power.” *Id.*

²² NYDPS Petition to Deny, p. 8. An “Economic Area” (or EA) is a service area based on designations by the Bureau of Economic Analysis, U.S. Department of Commerce. The EAs analyzed were numbers 5, 6, 7, 8, and 10. New York City is located within EA #10. NYDPS Petition to Deny, p. 8, fn. 16.

²³ *Id.* at 9. While NRUF data are considered confidential reflecting the telephone numbers in active use, reported by town, county and state, these data are reviewable by state public service commissions and FCC.

“commonly accepted measure of market concentration” which is calculated by summing the squared values of market share for each firm competing in the market.²⁴ The Justice Department further explains that:

The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. ... Those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission.²⁵

The Commission, in its Fourteenth Report, said that it has used a slightly different trigger level than the DOJ used; the FCC used 2800 HHI post-merger points with 100 HHI change points, or an overall change of 250 points regardless of the HHI post-merger level, rather than the DOJ’s 1800 HHI post-merger points with 100 HHI change points, as the trigger level to estimate the impact of mobile wireless provider mergers.²⁶ The Commission used year-end 2008 NRUF data, which reflects a facilities-based provider’s number of subscribers and phone number usage.²⁷

Using the NRUF data for New York, the NYDPS determined that the HHI values for the New York City Area were [REDACTED] HHI points before the merger and [REDACTED] HHI points post-merger, with a difference of [REDACTED] HHI points.²⁸ The NYDPS concluded that these values triggered the FCC’s screens for further review for anticompetitive impacts.²⁹

²⁴ See <http://www.justice.gov/atr/public/testimony/hhi.htm>, accessed June 8, 2011.

²⁵ *Id.*

²⁶ Fourteenth Report, ¶ 49. The Commission used the overall change of 250 points in evaluating the AT&T / Cingular Wireless merger in 2004. *Application of AT&T Wireless Service, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0001656065 *et al.*, Memorandum Opinion & Order, 19 FCC Rcd 21522, 21568 ¶¶ 106, 108.

²⁷ *Id.* at ¶¶ 50, 52.

²⁸ NYDPS Petition to Deny, p. 9.

²⁹ *Id.*

The NYDPS stated that, based on the HHI analysis, the merger will materially increase the level of market concentration in New York City.³⁰ The NYDPS contends that the markedly higher market concentration merits further FCC scrutiny and imposition of conditions to mitigate adverse impacts.³¹

The MDTC agrees with the NYDPS that these findings are significant and that the HHI analysis has provided the Commission with valuable quantifiable data to evaluate the anticompetitive effects of the AT&T/T-Mobile merger. The use of the HHI analysis is valid and appropriate in this context.³²

III. The Boston Metro Area and Total Massachusetts HHI Analyses Reveal Significant Market Level Concentrations and Justify Additional Merger Review.

The MDTC conducted its own HHI analysis of 2011 NRUF data to ascertain the levels of market concentration for mobile wireless subscribers, and the change in those levels, for the Boston Metro area (“Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH-RI-VT, BEA Economic Area #3”) which includes ten central and eastern Massachusetts counties.³³ The MDTC also analyzed the NRUF data for all 14 Massachusetts counties, weighted by subscriber levels. MDTC staff used the HHI to analyze Massachusetts-specific NRUF data for the mobile

³⁰ *Id.* at 10. The NYDPS also engaged in an analysis of spectrum aggregation that would occur following the merger. The MDTC has not had sufficient time to conduct a similar review.

³¹ *Id.* at 3.

³² Leap Wireless and Cricket Communications Petition to Deny, pp. 11-12; Sprint Nextel Petition to Deny, p. 26.

³³ The Boston Metro Area (Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH-RI-VT, BEA Economic Area #3) includes the following ten Massachusetts counties: Barnstable, Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Plymouth, Suffolk, and Worcester. The remaining four Massachusetts counties – Berkshire, Franklin, Hampden, and Hampshire – are contained in the New York City Area (“New York-No. New Jersey-Long Island, NY-NJ-CT-PA-MA-VT BEA Economic Area #10”). MDTC staff and the NYDPS staff discussed this inclusion and concluded that the four Massachusetts counties were included in the NYDPS’s calculations for the New York City Area. The MDTC did not conduct an analysis of those counties in New Hampshire, Rhode Island, or Vermont which are located in the Boston Metro Area.

wireless subscribers in Massachusetts as of February 2011.³⁴ The MDTC's findings are consistent with the NYDPS findings and concerns.³⁵

The resulting HHI values and changes in values for Massachusetts are as follows:

Economic Area	HHI value before AT&T/T-Mobile merger	HHI value after AT&T/T-Mobile merger / HHI	Change (delta) of HHI values	Did HHI values exceed triggers?
Boston Metro Area (Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH-RI-VT)	[REDACTED]	[REDACTED]	[REDACTED]	Yes. HHI after merger >2800 HHI points; post-merger change is >100 HHI points. Also, post-merger change in HHI is >250 points regardless of HHI level
Total MA Economic Areas (all 14 MA counties, subscriber weighted)	[REDACTED]	[REDACTED]	[REDACTED] ³⁶	Yes. HHI after merger is >2800 HHI points; post-merger change is >100 HHI points. Also, post-merger change in HHI is >250 points regardless of HHI level

The HHI analyses for the Boston Metro area and for the total Massachusetts economic areas reveal the significant potential for anticompetitive impacts due to the AT&T/T-Mobile merger. The FCC's merger-based HHI screens are triggered – first, the post-merger HHI value exceeds 2800 points of market level concentration. Boston is [REDACTED] and Massachusetts

³⁴ NRUF database, February 1, 2011. Proprietary data; the MDTC entered into non-disclosure agreement with NANPA for company-specific number utilization data.

³⁵ The Public Notice advises commenters that new issues may not be raised in responses or replies per 47 C.F.R. § 1.45(c). Public Notice, p. 4. Although the MDTC did not file comments or a petition to deny during the May 31, 2011 initial round, good cause exists for the Commission to accept and review the Massachusetts-specific data as supplementing existing issues raised by the NYDPS and others in this docket.

³⁶ Calculations of the HHI values are rounded to the closest whole value.

as a whole is [REDACTED], well above the national average of 2848. Next, the change in the HHI value from pre-merger to post-merger exceeds 250 HHI points. Boston is [REDACTED] and Massachusetts is [REDACTED]. These results clearly point toward the need for further scrutiny of the impacts in Massachusetts from the AT&T/T-Mobile merger.

IV. Conclusion

The MDTC encourages the FCC to engage in further review of the impacts of the AT&T / T-Mobile merger on Massachusetts and to take steps the FCC deems appropriate to ameliorate those adverse impacts to consumers and competition. The FCC should subject this transaction to heightened scrutiny and perform a rigorous, market-specific review of its impacts on Massachusetts' wireless voice and broadband markets. Furthermore, the FCC should allow additional process and opportunities for further review and comment as the FCC moves forward in its review.

Respectfully submitted,

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